Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

Number 93-1739

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOSEPH A THOMPSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTES. 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853) . . 6

Commonwealth v. McCue's Executor, 109 Va. 302, 63 S.E. 1066 (1909) 6

Hawkins v. Landmark Finance Co., 727 F.2d 324, 326 (CA4 1984) 7

In re Hollis, 810 F.2d 106 (CA6 1987) 5

In re Thompson, 16 F.3d 576, 579 (CA4 1994) 6

In re Zarzynski, 771 F.2d 304 (CA7 1985) 5

Kelly v. Robinson, 479 U.S. 36 (1986) 3

Kincaid v. Commonwealth, 200 Va. 341, 105 S.E.2d 846 (1958). 6

Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968) . 6

Statutes

11 U.S.C. § 523(a)(7) 4

Virginia Code § 19.2-356 4

Virginia Code §§ 19.2-336 4

STATUTES

11 U.S.C. § 523(a)(7) (1978)

The statute is set forth in the Appendix to the Petition for Writ of Certiorari.

Va. Code Ann. § 19.2-336 (Michie 1990)

The statute is set forth in the Appendix to the Petition for Writ of Certiorari.

Va. Code Ann. § 19.2-356 (Michie 1990)

Payment of fine or costs as condition of probation or suspension of sentence. -- If a defendant is placed on probation, or imposition or execution of sentence is suspended, or both, the court may make payment of any fine, or costs, or fine and costs, either on a certain date or on an installment basis, a condition of probation or suspension of sentence.

STATEMENT OF THE CASE

On September 22, 1988, Joseph A. Thompson was convicted of a felony in the Circuit Court for the City of Alexandria. The Circuit Court sentenced Thompson to confinement in the state penitentiary for a period of five (5) years and further ordered him to pay the costs of prosecution. On December 13, 1991, Thompson filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code. Thompson was granted a discharge from his debts on March 25, 1992.

Subsequent to receiving his discharge in bankruptcy, Thompson filed a motion to reopen his estate to add unpaid court costs arising from his 1988 criminal conviction as a debt to be discharged. On June 22, 1992, the Commonwealth filed an opposition to this motion. On September 30, 1992, the Bankruptcy Court issued a Memorandum in which it set forth its reasons for denying the motion.

Thompson filed his notice of appeal from the Bankruptcy Court's decision on August 19, 1992. On December 28, 1992, the United States District Court for the Eastern District of Virginia, Alexandria Division, reversed the decision of the Bankruptcy Court. The District Court issued a Memorandum wherein it held that Thompson's court costs were dischargeable in bankruptcy and that the Bankruptcy Court abused its discretion in denying Thompson's motion to reopen his case. The District Court issued an Order remanding the case to the Bankruptcy Court for proceedings consistent with its rulings. On January 27, 1993, the Commonwealth filed its notice of appeal.

On February 1, 1994, the United States Court of

Appeals for the Fourth Circuit reversed the District Court. The Court of Appeals issued an Opinion wherein it held that court costs imposed by a Virginia court as part of a criminal sentence are nondischargeable and that the District Court erred in determining that the Bankruptcy Court abused its discretion in denying Thompson's motion to reopen his case.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied for the following reasons:

(1) The holding of the Court of Appeals for the Fourth Circuit is consistent with the applicable decision of this Court, *Kelly v. Robinson*, 479 U.S. 36 (1986). The *Kelly* Court held that "any condition a state criminal court imposes as part of a criminal sentence" is nondischargeable in Chapter 7 bankruptcy. In considering the context in which Virginia imposes court costs, the Fourth Circuit found that costs are only imposed upon a defendant who is convicted and further; that court costs may be imposed as a condition of probation. Based upon these findings, the Fourth Circuit correctly held that court costs arising from a criminal conviction are nondischargeable under Chapter 7 of the Bankruptcy Code.

(2) The holding of the Fourth Circuit is in accordance with the holdings of the two other United States Courts of Appeals which have considered the same issue.

(3) The decision of the Fourth Circuit does not conflict with the decisions of the Supreme Court of Virginia. The Supreme Court of Virginia has never considered the issue of court costs within the context of federal bankruptcy law.

I. THE HOLDING OF THE COURT OF APPEALS IS CONSISTENT WITH THE RULE OF *KELLY V. ROBINSON*.

The Court of Appeals for the Fourth circuit held that the court costs assessed against Thompson as an incident of his state criminal conviction were not dischargeable in a Chapter 7 bankruptcy. The Court of Appeals based its decision upon an analysis of 11 U.S.C. § 523(a)(7), Virginia Code §§ 19.2-336 *et seq.* and Virginia Code § 19.2-356. The court's analysis conforms to the rule enunciated in *Kelly v. Robinson*, 479 U.S. 36 (1986).

In *Kelly*, the Court considered whether restitution payments imposed upon a Connecticut debtor as a condition of probation were dischargeable in Chapter 7 bankruptcy. The Court held that § 523(a)(7) of the Bankruptcy Code preserves from discharge "any condition a state criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. 36, 50 (1986).

A Connecticut statute authorized imposition of restitution as a condition of probation. However, the debtor argued that restitution was compensation for the victim's loss and therefore not preserved from discharge under § 523 (a)(7).

For purposes of § 523(a)(7), the Court considered restitution "in the context in which it is imposed," namely, to

advance the penal goals of the State. The Court concluded that restitution orders imposed as part of criminal proceedings further the State's goals of rehabilitation and punishment rather than the victim's interest in reimbursement. The penal interests of the State were sufficient to place restitution orders within the meaning of § 523(a)(7).

In the instant case, the Code of Virginia authorizes a trial court to impose court costs as a condition of probation. Va. Code Ann. § 19.2-356 (Michie 1990). Although Thompson's court costs were not imposed as a condition of probation, the Commonwealth submits that the definitional determination of these costs for the purposes of federal law should not change with the specifics of a given case.

Pursuant to the Virginia Code, only a defendant who is convicted must pay court costs. Va. Code Ann. § 19.2-336 (Michie 1990). Given the punitive context in which Virginia imposes court costs, the Court of Appeals concluded that court costs are a "condition a state criminal court imposes as part of a criminal sentence."

The Commonwealth submits that the rationale and holding of the Court of Appeals conforms to the analytical framework promulgated in *Kelly*. Therefore, its decision should not be disturbed on appeal.

II. THE HOLDING OF THE FOURTH CIRCUIT IS IN ACCORDANCE WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF VIRGINIA.

Two other federal circuit courts have held that costs arising out of a criminal conviction are not dischargeable in bankruptcy.

In *In re Hollis*, 810 F.2d 106 (CA6 1987), the Sixth Circuit held that costs, including court costs, imposed as a condition of probation are not dischargeable in Chapter 7 bankruptcy.

In *In re Zarzynski*, 771 F.2d 304 (CA7 1985), the Seventh Circuit concluded that court costs imposed as part of a criminal sentence are not dischargeable in Chapter 7 bankruptcy.

The Commonwealth submits that there is no conflict between the decision of the Fourth Circuit in this case and the decisions of the Sixth and Seventh Circuits.

The Supreme Court of Virginia has not interpreted the federal Bankruptcy Code as applied to costs arising from a state criminal conviction. Therefore, the cases relied upon by Thompson are not relevant to the decision of the Fourth Circuit.

In *Anglea v. Commonwealth*, 51 Va. (10 Gratt.) 696 (1853), the Supreme Court of Virginia held that a governor's pardon did not relieve a felon of the obligation to pay court costs.

In *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968), the Supreme Court of Virginia held that the petitioner's imprisonment for nonpayment of costs assessed as part of his criminal conviction constituted involuntary servitude in violation of the Thirteenth Amendment to the Constitution of the United States.

In its Opinion, the Court of Appeals considered two

additional decisions by the Supreme Court of Virginia, *Commonwealth v. McCue's Executor*, 109 Va. 302, 63 S.E. 1066 (1909) and *Kincaid v. Commonwealth*, 200 Va. 341, 105 S.E.2d 846 (1958). The court observed,

"In none of the Virginia cases cited were the courts confronted with the task outlined in *Kelly* of balancing Congress' desire to afford relief to over-extended debtors, and the state's interest in prosecuting its criminal laws." *In re Thompson*, 16 F.3d 576, 579 (CA4 1994).

The Supreme Court of Virginia has never considered whether costs arising from a state criminal conviction are dischargeable in Chapter 7 bankruptcy. The Commonwealth therefore submits that there is no conflict between the decisions of the Supreme Court of Virginia and the decision of the Fourth Circuit in this case.

III. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE BANKRUPTCY COURT PROPERLY DENIED THOMPSON'S MOTION TO REOPEN HIS CASE.

In the Fourth Circuit, the issue of whether to permit a Debtor to reopen a case is a matter resting within the sound discretion of the court below. *Hawkins v. Landmark Finance Co.*, 727 F.2d 324, 326 (CA4 1984).

The Bankruptcy Court denied Thompson's Motion to Reopen his case on the grounds that the debt was nondischargeable. The Court of Appeals likewise concluded that the debt at issue was nondischargeable in Chapter 7

bankruptcy. Therefore, the Court of Appeals properly found that the Bankruptcy Court did not commit an abuse of discretion in denying Thompson's Motion to Reopen.

CONCLUSION

The decision of the Fourth Circuit is consistent with the guidelines set forth by this Court in *Kelly v. Robinson*. The decision is consistent with the holdings of the two other Courts of Appeals which have considered the issue. There is no conflict between the federal question decided in this case and any decision of the Supreme Court of Virginia.

For the foregoing reasons, the Commonwealth respectfully requests that the Court deny Thompson's Petition for a Writ of Certiorari.

Respectfully submitted,

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